IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 495 of 1991

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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MAHISYRALI MAHAMMAD VAKIL - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :

MR RR MARSHALL for Appellant(s) : 1,
MS MS PANCHAL, LD.APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 13/07/2007

ORAL JUDGMENT

1. The present appeal is preferred by the applicant-orig.accused no.5 (hereinafter referred to as 'the appellant') under Section 374 of the Code of Criminal Procedure, 1973, against the judgment and order of conviction

and sentence dated 03rd May 1991 passed by the learned Extra Assistant Judge and Additional Sessions Judge, Surat in Sessions Case No.76 of 1990. The present appellant as well as other five accused persons were charged and tried by the learned trial Judge for the offences punishable under Sections 395, 397, 363, 342, 399 read with Section 120(B) of the Indian Penal Code and also under Section 25-A of the Arms Act. After conclusion of the trial, the learned trial Judge has been pleased to hold the appellant herein guilty of the charge of offences punishable under Sections 395, 363 read with Section 120(B) of the Indian Penal Code and directed him to undergo rigorous imprisonment for three years on each count and to pay a fine of Rs.100/- for each offence proved and in default of payment of fine, the appellant shall undergo simple imprisonment for 15 days for each count. The learned trial Judge has ordered the sentences to run concurrently.

2. The appellant has challenged the legality and validity of the judgment and order of conviction and sentence under challenge on various grounds mentioned in paragraph no.1 of the memo of the appeal. Considering the quantum of punishment imposed by the learned trial Judge and the fact that the present appellant was on bail pending trial, this Court has enlarged the appellant on bail pending hearing and final disposal of the present appeal vide order dated 17th September 1991 and therefore, at present the appellant is on bail.

3. The learned trial Judge on conclusion of the trial decided to acquit the orig. accused nos.1 and 2, however, held the orig. accused nos.4 to 6 guilty of the aforesaid charges. As this Court is informed by Shri R.R. Marshall, learned counsel appearing for the appellant and Ms.M.S. Panchal, learned Additional Public Prosecutor, that the orig.accused nos.3, 4 and 6 have not challenged the judgment and order

of conviction and sentence and, therefore, now the Court shall have to evaluate the legality and validity in the strength of the judgment and order of conviction and sentence in reference to the case placed by the appellant. As per the basic story of the prosecution, a group of about 8 to 10 accused persons was holding deadly weapons like revolver, knife, etc. and so they were chargesheeted by the Investigating Agency accordingly saying that some of the accused persons were absconding yet. At an initial stage, the Police had chargesheeted accused persons for the offence punishable under Section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA Act), but considering the nature of allegations made against the accused persons and other relevant papers of investigation submitted along with the chargesheet by the Police, the learned Sessions Judge passed an order on 20th April 1990 that the case against the accused persons should be tried as Sessions Case only and, therefore, the trial

has been conducted by the learned Additional Sessions Judge treating the charge under the TADA Act as dropped.

4. The case of the prosecution reflected in the complaint filed by the complainant-Lotan Baliram in nutshell is that at the relevant point of time, he was serving as a driver with a company owned /managed by one N.J. Verma and he was driving the motor truck bearing registration No.MWD-1305. One Shaikh Kalu Shaikh Nizam was also with him as a second driver-cum-cleaner, and the said truck was being plied for transporting Liquefied Petroleum Gas (LPG) Cylinders from Hajira Gas Plant to various stations towards Nagpur. On 18th August 1989, he had left for Malkapur by loading 300 LPG filled up cylinders. They had reached Malkapur at 01-00 p.m. on 19th August 1989. Those cylinders were unloaded there and they were returning with 300 empty cylinders at about 04-00 p.m. They had reached Dhulia at night and had overstayed at the place arranged

by his employer and on 20th August 1989, they had left for Hajira at about 04-00 a.m. When at about 11-00 p.m. to 11-30 p.m. they were at a distance of about 4 kms. from Kadodara, one mini truck popularly known as metadoor or Tempo overtook the truck of the complainant and ultimately intercepted the truck driven by the complainant. The said vehicle was the Tata 407 model tempo/truck having covered body and shutter, so that one can close and lock the body of the vehicle. About 8 to 10 persons had got down from the said vehicle. All of them had put on pants and shirts of different colours. When the truck of the complainant was intercepted, some passengers who were vegetable vendors were also travelling by the truck driven by the complainant who were taken as passengers from village Dahinvel. The complainant, driver-cum-cleaner and the vegetable vendors who were sitting in the truck were forced to get down from the truck. One of the accused had pointed out knife on the abdomen of the complainant and other two

had shown pistols to the persons sitting in the truck. Thereafter, the accused persons had asked the complainant to hand over the 'chalan' given to him and the complainant had informed the accused persons that the same is lying in the truck. Immediately thereafter one of the accused persons had forcibly closed the eyes of the complainant and thereafter, some of them had looted the truck loaded with 300 empty LPG cylinders. According to prosecution, the accused basically resident of Mumbai had criminally conspired a robbery and one of the accused had hired the house and in the incident they had used the tempo which was entrusted by the owner of the tempo to one of the co-accused. The driver of the tempo is one of the conspirators. The complainant had attempted to see the registration number of the said tempo. It is alleged that all of them were initially asked to board the tempo and the remaining accused persons had also joined them. All the while they were showing pistols and knife to them and one of the accused had

started driving the said tempo. It was going at an excessive speed and so it toppled down after about one kilimetre and was dragged to a ditch which was having some water inside and so everybody was compelled to come out of the tempo. The accused persons thereafter stopped one vehicle and boarded the same and had left the spot. At that time, the accused persons had attempted to read the number of that vehicle. Thereafter, the complainant and the second driver were able to escape and after hiring the autorickshaw reached the Police Station and ultimately lodged the complaint in question.

5. According to prosecution, the value of the truck looted was of about Rs.2.50 lakhs and the value of empty gas cylinders was Rs.1.35 lakhs. During the course of investigation, the Police was able to reach to the tempo which had toppled down and it was found that the vehicle, which was used initially by the accused persons, was owned by one Iqbal Ahmed

Ijharali, resident of Sonu Diesel Services, National Highway No.8, Vasai Fanta, Thane, Dist. Maharashtra. Of course, other two persons have also claimed that they are the owners/opponents of the tempo bearing registration No.MCY-936. In the judgment under challenge in this appeal, at certain places there are typographical errors and the registration number of the tempo is shown as MCY-396. During the course of investigation, the Police was able to unearth the conspiracy and was able to arrest six accused persons and had seized 355 LPG cylinders with cap and two other vehicles, including one Suzuki Motorcycle and one tempo bearing registration no.MCY-936. Of course, the complainant was not knowing the name of the vegetable vendors who had boarded the truck but it was easy for the Police to trace out this witnesses as they were from village Dahinvel. It is alleged that the accused persons were responsible for kidnapping one of the vegetable vendors forcibly with them. It is alleged that one of

the accused i.e. orig. accused no.6 had sustained injuries as he was carrying open knife with him at the time when the tempo had toppled into the ditch. He was taken to private hospital, treated there and at the time of his arrest, he was found with bandage applied by the doctor. Most of the accused were arrested on the next day, except the accused persons who were absconding, except the injured witness. The Police was able to seize 355 cylinders from the godown of orig. accused no.1-Kamlesh running a business in the name of Kamlesh Gas Agency. According to prosecution, the orig.accused nos.1 and 2 were also conspirators and were party in the decoity committed by the accused persons and the mitigation of minds was made at the residence of Sagir Khan. This Sagir Khan is shown to be the ring-leader and the master mind behind the offence in question who established the link between the co-conspirators; and when the tempo No.MCY-936 was on its transport trip in the area, it was

used with the help of the driver of the tempo i.e. appellant herein. According to prosecution, the accused nos.1 and 2 had disposed of the alleged LPG cylinders and the Police also traced out as to from where the additional 55 LPG cylinders were stolen by the accused persons. It is alleged that the offence of stealing of 55 LPG cylinders was committed from an open space where the company was keeping the LPG cylinders and that place was shown by the present appellant and orig. accused no.4. The Police was able to locate the truck looted by the accused persons in the early hours at about 04-15 a.m. on the next day of the incident and after getting clue from the persons who had intercepted the truck in the early hours on 21st August 1989, the appellant was able to reach to the house of orig.accused no.1 and while the accused no.1 was slipping, he was caught and intercepted. According to the prosecution, no revolver has been seized in the present offence, but it is alleged that the persons who were arrested

were chargesheeted and the Police was hopeful to recover revolver from the absconding accused persons. The Police also ascertained and collected the evidence as to the ownership of the godown in which the muddamal cylinders were off-loaded and stored, and the statement of relevant witnesses were also recorded, including the statement of Village Secretary. Various panchnamas have been drawn, including the arrest panchnama of the accused persons, discovery panchnama, and the Investigating Agency has also collected the evidence as to the treatment given to the injured accused who had participated in the crime as one of the conspirators.

6. This Court is supposed to deal with the entire judgment in a very narrow compass comparatively because the argument of Shri R.R. Marshall, learned counsel appearing for the appellant, is in reference to the reasons assigned by the learned trial Judge while linking the accused with the crime as one of

the conspirators and the person who had actively participated in the offence of decoity along with other convicts and absconding accused persons. The say of Shri Marshall is that there is no legal, cogent or convincing evidence as to the identity of the appellant herein, and the learned trial Judge ought not to have accepted the evidence of PW-16-Suresh Harsinh at Ex.53. He appears to be a chance witness. His name was not disclosed as a witness in the complaint, and when the so-called other vegetable vendors who had boarded the truck have not identified the appellant, how the version of PW-16 Suresh Harsinh could have been believed by the learned trial Judge. The learned trial Judge ought to have held that it would be risky to accept the version of Suresh Harsinh as gospel truth qua his statement before the Court that he had seen the present appellant at the spot of the incident and stated that he was driving the tempo in question. The said aspect would not be possible for a person sitting inside the

tempo because the overtaking vehicle normally would go from the rightside as per the traffic rules and at that time, the cleaner seat would be on the truck side and the driver of the tempo would be on the otherside. Practically all the witnesses have accepted that they have not seen anybody who were in the tempo till they came out of the tempo. Thereafter, when Suresh has said that his eyes were closed and for that purpose the accused persons had used pieces of clothes. In such a situation, the learned trial Judge ought to have appreciated certain inconsistencies reflected from the deposition of this witness, which is there in the examination-in-chief of this witness and so also in the cross-examination of this witness. He has pointed out the relevant part of the facts stated by this witness from the examination-in-chief and the cross-examination (relevant page nos.277 of the paperbook).

7. The second argument of Shri Marshall is that this Court and the Apex Court in number of

decisions have held that identification of the accused in the Court for the first time is a weak piece of evidence. So the act of identifying the present appellant in the court room during the course of trial ought not to have been given any weightage and the complainant who had allegedly identified the appellant herein, has not identified orig. accused no. 4 in the Court during the course of examination-in-chief. So the evidence as to the identity of the appellant is hazy and, therefore, the learned trial Judge ought to have given benefit of doubt to the appellant.

8. One more argument advanced by Shri R.R. Marshall, learned counsel appearing for the appellant, is that the panchnama Ex.30 is not reliable document. It appears to be a created document. The accused no.4 and appellant herein have allegedly shown the place from where 55 LPG cylinders were stolen. Normally such a discovery type of panchnamas are not being prepared jointly. The discovery of facts

normally would be by one and not by two accused persons simultaneously and one of them also could have led the Police to the spot of incident, but as there was no adequate evidence with the Investigating Officer qua the present appellant, his name has been mentioned in the panchnama Ex.30. There is no whole-hearted support even by the panch witness examined to prove this panchnama Ex.30. Even in the open Court, the panch was able to identify accused no.4 and not the present appellant. In such a situation, the learned trial Judge ought not to have given any weightage to this documentary evidence.

9. PW-18 Shantilal Bhanubhai examined vide Ex.58 has categorically accepted that he was not able to identify certain accused persons because his eyes were closed though the offence is a very grave offence, but while linking the accused persons with the charge of conspiracy, the learned trial Judge ought to have expected more cogent and convincing

evidence against the appellant. PW-21 cleaner of the truck examined vide Ex.79 namely Shaikh Kalu Shaikh Nizam has identified three persons i.e. accused nos.3, 4 and 6, and not present appellant. It is settled legal position that if the case of the prosecution rests upon the evidence of a solitary witness, then the Court should be doubly sure that the version of such a witness is trustworthy, otherwise the Court should insist for some strong corroboration from other evidence, may be oral or documentary. Here no witness can be said to have corroborated PW-16 Suresh Harsinh.

10. It is argued that even the Investigating Officer has not satisfactorily proved the panchnama Ex.30 and the Test Identification (T.I.) Parade panchnama drawn by PW-10 Executive Magistrate, Bardoli, suffers from certain basic infirmities because it has come on record that prior to arranging the T.I. Parade, the accused persons arrested were produced before the learned Magistrate and a

formal order of remand was obtained. It is on record that the present appellant was arrested on 21st August 1989 and T.I. was arranged on 23rd August 1989. The prosecution ought to have proved at least beyond reasonable doubt that the appellant was employed by the owner of the tempo as driver of the tempo and he was in-charge of the vehicle when it came to be used to commit robbery. The name of the owner of the tempo was with the Police and the Court. Exercising powers under Section 311 of the Code of Criminal Procedure, 1973, at least the learned trial Judge ought to have called the owner to prove that the present appellant was in his employment. It is the case of the prosecution that one person was present near the turtled tempo bearing registration No.MCY-936 and that person has claimed to be the owner of the tempo. Undisputedly, that person was not the owner of the tempo. Either that person ought to have been joined as accused or he ought to have been joined as prosecution witness to link the present appellant with the

crime. One another person who was regularly bringing the said tempo before the trial Court namely Rahemtulla Farooqui has also claimed that he is the person in-charge of the tempo. The Court was accepting the custody of the vehicle from him and at the end of the trial on each date of hearing, the Court was returning the tempo to the very man and detailed proceedings have been drawn by the learned trial Judge in that respect. It appears that the said Shri Farooqui was neither interrogated nor cited as witness. So non-examination of important witness has emerged as serious infirmity so far as the case of the present appellant is concerned. None of the accused has claimed the muddamal. When the person at whose instance about 355 LPG cylinders with cap were found or from whose custody such a valuable muddamal has been seized has been acquitted by the learned trial Judge saying that evidence against these accused persons is incomplete or hazy, then the present appellant also ought to have been

acquitted by the learned trial Judge.

11. According to Shri R.R. Marshall, the prosecution has also not collected the evidence as to whether the muddamal seized from the godown of accused no.1 i.e.LPG cylinders were having LPG in it or they were empty cylinders. It is mentioned that the LPG cylinders seized were with cap and the complainant has never described the looted muddamal as LPG cylinders with cap. So the muddamal seized by the Police is whether the muddamal looted in the incident or is a different material, is also a question. So there is no evidence of convincing nature to show that the muddamal LPG cylinders produced before the Court was the actual muddamal which was allegedly looted. It is hammered that the finding arrived at by the learned trial Judge is mainly based on conjectures and surmises. Merely because the accused persons are from a particular locality of Mumbai, they ought not to have been branded as conspirators. The

material witnesses examined to prove the residence and regular meetings with the accused persons at a given spot i.e. at the place hired by Sagir Khan, have not supported the case of the prosecution. It is true that it is difficult to collect the evidence qua the hatching of criminal conspiracy because the conspiracies are being hatched secretly, but the prosecution could not establish the element of conspiracy by bringing circumstantial evidence, including the conduct of the accused. The abetment in crime is materially different than participation in an offence as conspirator. It appears that the learned trial Judge has jumped to an inference as to the existence of criminal conspiracy amongst accused persons, which is based on conjectures. For short, the present appeal should be allowed and the appellant should be acquitted from all the charges levelled against him in respect of the offence in question.

12. Ms.M.S. Panchal, learned Additional Public Prosecutor, has strongly resisted the aforesaid submissions made by Shri R.R. Marshall, learned counsel appearing for the appellant, and she has submitted that the owner of the truck Iqbal Ijharali had approached the Court much prior to leading of formal evidence and had requested the Court to hand over the muddamal tempo to him. In the application itself, the owner has stated that the Tempo bearing registration No.MCY-936 was handed over to the present appellant and he was entrusted the said vehicle for a particular purpose but after reaching the destination, he waited in District Surat and meanwhile, the vehicle has been used for the criminal act in question. It is further stated that he is innocent and he being the owner of the vehicle, the vehicle should be handed over to him. This request was turned down by the learned trial Judge. But with the same contention, the order as to the disposal of the muddamal was challenged before the learned

Sessions Judge and the learned Sessions Judge accepting the say of the owner of the tempo, decided to hand over the said tempo No.MCY-936 to the said Iqbal Ahmed Ijharali. In paragraph no.2 of the application dated 10th November 1989, submitted to the Court, he has referred to the name of the present appellant. It is true that the statement of the owner of the tempo is not binding to the present appellant but it is a circumstance against the appellant which can be used by the prosecution as corroborative piece of evidence, if not as a substantive piece of evidence.

13. The second point of argument of Ms.M.S. Panchal, learned Additional Public Prosecutor, is that when the vehicle was intercepted and looted, all the persons may be under various types of apprehension and fear. The capacity to identify maximum number of persons depends on the capacity of an individual and it varies from person to person. It is very likely that some of the witnesses may have seen one or two

accused persons. When it is the case of the prosecution that lights of both the vehicles were “ON”, it is possible to identify the accused persons because lights of heavy vehicles are comparatively powerful. Even after stopping of the vehicle, the deem light of a heavy vehicle would be sufficient to locate a person if he is coming from the opposite direction of the vehicle. There is the consistency in the story of the prosecution to the effect that the offending vehicle was coming from behind and it had overtaken the truck looted by the accused. The driver of the tempo had stopped his tempo in front of the truck driven by the complainant. It is true that the tempo may not be airtight container and merely because the offending vehicle i.e. tempo was having body which can be closed or locked, the Court cannot legally infer that as the vehicle was having a particular type of body, it was selected by the accused persons, and selection of such a vehicle itself is sufficient to infer a

conspiracy. It is true that certain portion of the judgment is based on unconvincing inferences, but all these inferences collectively do not make the ultimate finding either bad or illegal. This Court should concentrate on the actual finding recorded against the present appellant and according to Ms.Panchal, these findings are based on proper appreciation of evidence led by the prosecution. According to Ms.M.S. Panchal, learned Additional Public Prosecutor, the learned trial Judge has not committed any error in accepting the version of PW-16 Suresh Harsinh. According to Ms.Panchal, the prosecution witnesses have deposed in a natural way and all the witnesses who have supported the case of the prosecution, have stated the facts which they were actually knowing; otherwise PW-16 ought to have created material contradictions and conflicts qua his previous statement given before the Police. There is no material contradiction or conflict in the evidence of Suresh Harsinh qua his

statement before the Court as to the identity of the present appellant. It was not impossible for this witness to see the appellant and identify him in the Court. This witness perhaps was not taken before the Executive Magistrate, otherwise he ought to have identified the very person. If the prosecution witnesses were tutored and they were deposing the same at the instance of the Investigating Officer, PW-Shantibhai might have said something against the present appellant. M.S. Panchal, learned Additional Public Prosecutor, has referred to the facts stated by the said PW-16-Suresh in his examination-in-chief and the cross-examination made by the defence counsel as to the identity of the appellant. According to Ms.Panchal, as such there is neither inconsistency nor contradiction which can be said to be material. The learned trial Judge has rightly observed that looking to the time gap when this witness had identified the appellant and the time gap between the date of incident and

the date of deposition, minor contradiction if is found to have been occurred, the same can be ignored by the Court. This argument is based on settled legal position on the point of appreciation of evidence. The Court is in agreement with this submission that as such there is no material contradiction or inconsistency in the version of PW-16-Suresh. It would be wrong to presume or infer even for this Court that the appellant was the tempo driver and he must not have come out of the body of the tempo. On the contrary, he was the person driving the tempo when it had intercepted the truck looted, and thereafter, 8 to 10 accused persons had got down from the truck. The eyes of the complainant were opened till he was asked about “Chalan” of 300 LPG cylinders loaded in the truck. Each witness till his eyes were closed with the help of cloth pieces, was able to see. On the contrary, a small light would be sufficient to identify a person if the person is coming out or emerging from dark. This witness PW-Suresh

has not tried to involve more number of persons. The version of this witness, as rightly argued, is genuine and unnatural.

14. The next point advanced by Ms.M.S. Panchal, learned Additional Public Prosecutor, is that even the complainant had identified the present appellant during the course of T.I. Parade. Ms.Panchal has taken this Court through the deposition of PW-10 who is the Executive Magistrate of Bardoli namely Bhagu Patel Ex.63, and as per the panchnama as well as version of this witness, the complainant had identified the present appellant, one another accused Salamatali and Habid Khan. There is no effective cross-examination on the point by the learned counsel appearing for the appellant at the trial Court. There is nothing on record by which it can be inferred that it was possible for either PW-16 Suresh or the complainant to see the persons who are arrested and taken before the learned Magistrate, as such there was no exposure

between the prosecution witnesses and the persons arrested. The Executive Magistrate had taken enough care in arranging the T.I. Parade. So the presence of appellant has emerged as genuine at the place of the incident and only because of that he was identified by the complainant, then why this piece of evidence should not be considered as corroborative piece of evidence while evaluating the evidence of PW-16 Suresh, is a question posed by the learned Additional Public Prosecutor. Ultimately, according to Ms.Panchal, this is a case of conspiracy and the prosecution has been able to lead different circumstances collected by the Investigating Agency during the course of investigation and the Court should have a look on each circumstantial evidence collected and other direct evidence, if any. This is not a case based on pure circumstantial evidence but speaking circumstances corroborate the version of the witnesses who were victim of the offence committed by the accused persons.

15. According to Ms.M.S. Panchal, learned Additional Public Prosecutor, the panchnama Ex.30 has been proved by the officer who has drawn the same. The learned trial Judge has observed that there is no signature of the Investigating Officer on the said panchnama but in reality, the original panchnama bears the signature. It is true that such panchnama carried out jointly by two accused persons can be said to be a weak piece of evidence but the crucial question is how these two persons if they were really independent were able to take the Investigating Officer and panch witness to a place which is altogether a different place than the godown where 300 LPG cylinders were unloaded. According to prosecution, the panchnama Ex.30 is the panchnama of place from where 55 LPG cylinders were taken away. The Investigating Agency has attempted to settle account and this account has been shown successfully to the Court. This is the direct answer to the arguments advanced by Shri R.R.

Marshall as to how there were 355 LPG cylinders though actually 300 LPG cylinders were looted. The presence of additional 55 cylinders which have not been claimed by any of the accused, indicate the modus indirectly of the accused persons. There is nothing on record to show as to what was the scarcity and demand of such use of LPG cylinders in those days, but it appears that the accused persons had concentrated in collecting and selling LPG cylinders. It is likely that such articles were easy to be disposed of and to be circulated in the market without any risk.

16. The learned trial Judge has relied upon the evidence of PW-21-second driver-cum-cleaner of the truck at Ex.79. Of course, he has not identified the present appellant. But he has identified the accused no.4. This accused no.4 is the person, who according to Investigating Agency, had accompanied the present appellant upto the place from where 55 LPG cylinders were stolen. So the panchnama Ex.30 if is not

considered as discovery panchnama, the Court can infer that this place was noticed and traced out by the Investigating Agency on the clues given by the accused persons. Such clues cannot take place legally as a piece of evidence but when the accused claims total innocence, then his presence at the spot of incident at odd hours though he is resident of Mumbai, ought to have been accepted satisfactorily. It is true that examination of owner of tempo namely Iqbal Ahmed would have added more strength in the case of the prosecution, but absence of his evidence does not make the case of the prosecution weak. But for the active participation of the present appellant, the rest of the accused persons could not have used the tempo in committing the offence. There was no reason to drive the tempo on the opposite direction than towards Mumbai, otherwise the destination of the tempo would be towards Mumbai because he was asked to drop some household articles at a given address. So the gesture of detaining the

vehicle in Surat District under any pretext speaks about intention of the appellant, otherwise he would have returned to Mumbai either with empty vehicle or with other goods or material as he had assured the owner of the tempo. Merely because the tempo is referred to by the learned trial Judge as an airtight vehicle, this Court should not presume or assume that it was airtight. It appears that the tempo was having covered body and so one can lock the tempo after pulling down the shutter. The decoits may not be knowing that the vehicle which they are going to intercept would be carrying vegetable vendors. It may be a co-incident but when the presence of these vegetable vendors at the spot of incident or in the vehicle itself has not been seriously challenged by the defenceside during the course of trial, there was no reason for the learned trial Judge to discard the evidence of these witnesses. At the most, they would have been branded as chance witnesses. It is settled legal position that merely because a

witness is a chance witness, his evidence should not be discarded solely on that count. The Court tried to seek some corroboration, but each of these vegetable vendors corroborate one another so far as their travel in the truck in question is concerned and they have identified the same accused persons who were identified either during T.I. Parade or before the Court during the course of trial. There is no reason for these vegetable vendors to falsely implicate the accused persons in such a serious offence. So all these arguments advanced by Ms.M.S. Panchal are found acceptable and she has rightly argued that the reasons assigned by the learned trial Judge while concluding the finding that the prosecution has successfully established the element of presence of conspiracy, can be adopted by this Court ignoring certain exaggerations which have been made by the learned trial Judge. This Court can also adopt the reasons assigned by the learned trial Judge while accepting the evidence led against

the present appellant. On the contrary, this Court would like to state that the learned trial Judge ought to have observed specifically that PW-16-Suresh is a trustworthy witness and there is no risk in accepting his evidence as there is a strong corroboration to his evidence from other important proceedings which had taken place during the course of trial including the application preferred by the owner of the tempo for getting custody of the same under Section 452 of the Code of Criminal Procedure, 1973, and also T.I. Parade panchnama drawn by the Executive Magistrate. The version of an independent person i.e. Executive Magistrate amply corroborates PW-16 Suresh. The accused persons were armed with deadly weapons and, therefore, only one of the accused persons had sustained some injury, which could have been sustained by a sharp cutting instrument. No recovery by Investigating Agency so far as revolver is concerned, would not help the present appellant because this infirmity has

been explained by the Investigating Officer during the course of cross-examination. So this is not a case where the accused could have been given benefit of doubt. On the contrary, this Court is of the view that the appellant is inseparable from other accused persons who have not preferred appeal against the judgment and order of conviction and sentence and who have been identified by the other prosecution witness i.e. complainant, second driver-cum-cleaner and the vegetable vendors. The Court is, therefore, inclined to accept the aforesaid submissions made by Ms.M.S. Panchal, learned Additional Public Prosecutor.

17. The Court is of the view that the learned trial Judge has not erred in linking the appellant with the crime. The reasons assigned by the learned trial Judge are adequate, just and proper. There is no element of perversity or illegality in the findings recorded as well as in appreciation of the evidence. It is true

that this Court can rewrite the judgment and order of conviction and sentence considering the scheme of Section 374 read with Section 386 of the Code of Criminal Procedure, 1973 and can reach to its own finding, ignoring the findings recorded by the learned trial Judge. But when the Court is of the view that the ultimate finding of the learned trial Judge is legal and is not required to be disturbed, this Court may not assign its own reasons or findings, and this Court can say that there is no merit in the appeal on ultimate evaluation of the judgment and order of conviction and sentence under challenge vis-a-vis the evidence led during the course of trial.

18. In view of aforesaid observations and discussion, the present appeal is hereby dismissed. The judgment and order of conviction and sentence dated 03rd May 1991, passed by the learned Extra Assistant Judge and Additional Sessions Judge, Surat, in Sessions Case No.76 of 1990, is hereby upheld.

19. It is submitted by Shri R.R. Marshall, learned counsel appearing for the appellant, that as the appellant is enjoying bail since years, he should be given some reasonable time to surrender so that he can arrange for him and his family members. This submission is accepted. Hence, the appellant is directed to surrender himself within a period of 06 (six) weeks from today to serve the sentence, failing which the learned trial Court shall issue a non-bailable warrant against the appellant to secure his custody so that he can be sent to jail for serving the sentence. The bail bond executed by the appellant shall stand cancelled.

(C.K. Buch, J)

Aakar